

April 21, 2020

BRIEFING NOTE

Mortgage Brokers Act Consultation: Advance Fee Protections

On behalf of the Canadian Mortgage Brokers Association - BC (CMBA-BC), I thank you for the opportunity to make submissions in response to the consultation by the Ministry of Finance on proposed amendments to the *Mortgage Brokers Act* (the “MBA”).

In this brief, we are reviewing provisions in the *Business Practices and Consumer Protection Act* (BPCPA), which are incorporated into the MBA by reference and prohibit advance fees in mortgage transactions.

Current Status

Advance fees charged by anyone for arranging a mortgage for a “consumer purpose” are prohibited in British Columbia by the *Business Practices and Consumer Protection Act* (the BPCPA). Section 5 of the BPCPA prohibits mortgage brokers or lenders from engaging in deceptive acts or practices for transactions that are for primarily personal, family or household purposes. In addition, section 4(3) makes it a deceptive act or practice for any mortgage broker or lender to arrange a mortgage for a fee, **unless the fee is deducted from the mortgage advance at the time of closing**. Under s. 8 of the *Mortgage Brokers Act*, the registrar of mortgage brokers may discipline a mortgage broker registrant for a breach of a provision of Part 2 of the BPCPA, which includes section 5. The result is that a registered mortgage broker or lender cannot take advance fees from clients for arranging consumer mortgages, as fees can only be taken from the advance of mortgage funds at the time of mortgage funding. The prohibition does not impact the ability of a mortgage broker or lender to charge borrowers, in advance of closing, fees paid to third parties in the transaction, such as appraisal fees to appraisers.

One of the rationales behind the prohibition against advance fees would be to protect the public from a fraud, in which a fraudster, usually with an anonymous email address, website or cellular telephone number, solicits vulnerable, credit challenged people who seek funds, including mortgage funds. The fraudster then promises the mortgage funds to the vulnerable person in exchange for an advance fee, usually in the range of \$500 to \$2,000. The fraudster never funds the mortgage loan and keeps the advance fee. This kind of advance fee scam has been the subject of several cease and desist orders, which have been posted on the FICOM/BCFSA website since the Registrar of Mortgage Brokers obtained administrative powers to issue cease and desist orders for unregistered activity. I note that all orders made by the Registrar involving advance fee fraud involve unregistered persons and not any registered mortgage or submortgage brokers.

Challenges with the Current Status

- (1) One problem with sections 4(3) and 5 of the BPCPA is that they are convoluted statutory prohibitions which define the taking of advance fees as a deceptive practice instead of simply prohibiting a clearly identified activity. The BPCPA is an omnibus consumer protection statute, which does not specifically address mortgage transactions, and uses language and concepts which are not neatly tied into the mortgage industry.
- (2) The sections also overreach in that they prohibit fees paid by a borrower to a mortgage broker after a transaction has closed. The consumer protection concern addressed by a prohibition on advance fees is the prevention of advance fee fraud, which involves enticing consumers to pay fees in advance to a fraudster who promises a loan, but the loan never materializes. On occasion, mortgage brokers will receive fees post-closing from satisfied borrowers, who are under absolutely no duress to provide the fee once the transaction has closed. Post-closing fees to mortgage brokers do not present any consumer protection

concerns, and should not be prohibited without a clearly articulated and legitimate rationale, which does not appear to exist.

- (3) The advance fee prohibitions contained in the MBA are the most restrictive across all provincial mortgage broker licensing jurisdictions. The challenge for many mortgage brokers is that they may be reluctant to take on difficult residential mortgage clients, when their fee is contingent on their application actually being approved and funded. Often mortgage files require many hours of preparation, document management and negotiation. Sometimes mortgage commitments are obtained by mortgage brokers after they have invested significant amounts of time into the file, but the client will eventually opt for alternative financing or decline the offered financing – this can happen even at the last minute, just prior to closing. Under the wording of sections 4(3) and 5, mortgage brokers will have no way of collecting fees when there is never any mortgage funding from which to deduct the fee.

All mortgage brokers who deal in consumer mortgages are effectively prohibited from taking advance fees in order to assist in the prevention of a small number of fraudsters from taking advantage of the public. Most professionals, such as lawyers and accountants are able by contract to negotiate fees due in advance of the close of files or transactions. Lawyers, for example, commonly ask for a retainer of funds from a client, which are kept in their trust account and withdrawn only when the services and an account have been rendered.

In Ontario, section 37(1) of *the Mortgage Brokerages: Standards of Practice Regulation* provides that “If the principal amount of a mortgage is \$400,000 or less, a brokerage shall not require a borrower to make, and shall not accept, an advance payment or deposit for services to be rendered or expenses to be incurred by the brokerage or any other person.” Advance fees are therefore permitted to be charged by mortgage brokers in Ontario for residential mortgages with a principal sum of over \$400,000.

In Alberta, section 71(1) of the *Real Estate Act* Rules place restrictions on the collection of an advance fee for assisting an individual in obtaining a mortgage from a lender. This Rule applies to a mortgage where the borrower is an individual who enters into a credit arrangement primarily for personal, family or household purposes. It prohibits collecting a fee from such an individual until the lender has provided written confirmation to fund the mortgage to the borrower, has provided an initial disclosure statement and at least two business days have passed since the disclosure statement was received (or the individual has waived the time period for its delivery in accordance with the *Fair Trading Act*). In Alberta then, mortgage brokers are entitled to charge fees in advance of mortgage funding if a mortgage commitment has been obtained and cost of credit disclosure rules are followed.

(4) Many members of the industry have not understood some of the nuances of the scope and application of the BPCPA, which only applies to mortgage loans for *primarily personal, family or household* purposes – they have adopted a more simplistic but false conclusion that it applies to residential mortgages but not commercial mortgages. However, in many instances mortgages on residential properties can be for non-consumer purposes, such as development properties for resale or houses intended to be rented out to tenants. Mortgage loans on these kinds of transactions would not attract the advance fee prohibition as the purpose of the transaction is commercial, and not for *primarily personal, family or household* purposes

Recommended Changes

In regard to advance fee provisions which are currently incorporated into the MBA by reference, we recommend the following:

- (1) Any provisions dealing with the application of advance fees on mortgage transactions should be relocated to the MBA, and redrafted with more simple, clear language.
- (2) New advance fee rules should be redrafted to permit, without restriction, the taking of fees from borrowers after transaction closings, as consumer protection concerns are not triggered with this scenario.
- (3) There should be a balance between safeguarding the public interest from advance fee fraud and permitting an industry member to charge fees or collect a retainer for work performed on behalf of the client. Mortgage brokers and lenders should be entitled to collect advance fees for consumer mortgage transactions so long as those funds are held in a trust account maintained by the mortgage broker, lender, a lawyer or a notary, and withdrawn only in accordance with the terms of a Client Services Agreement and after the contractually agreed upon services of the mortgage broker or lender have been performed. This is similar to the retainer system employed by lawyers in British Columbia.

In addition, like mortgage brokers in Alberta, mortgage brokers in British Columbia should be permitted to take a fee at the time they provide a mortgage commitment to a consumer client, provided that cost of credit disclosure rules have been followed. Harmonizing the advance fee rule in British Columbia with that in Alberta for mortgage brokers and lenders further assists in fulfilling the mandate of the *New West Partnership and Trade Agreement* and the *Agreement on Internal Trade*, which promote labour mobility and harmonization between British Columbia and other provinces.

- (4) The “primarily personal, family or household” purposes trigger should be maintained. However, mortgage brokers and lenders who take advance fees for arranging residential mortgage transactions for non-consumer purposes should

clearly document the specific commercial (non-consumer) purpose of the mortgage in the commitment letter and disclosure documents. The non-consumer purpose should be evidenced in some way to avoid the potential of “papering over” the explanation to falsely make it fit within non-consumer parameters for the purpose of charging advance fees.

Yours truly,

A handwritten signature in cursive script, appearing to read "S. Gale", is positioned above the typed name.

Samantha Gale
CEO, Canadian Mortgage Brokers Association-BC